Alaska Oil and Gas Association

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Judith Brady, Executive Director

February 28, 2001

Mr. Randy Bates
Division of Governmental Coordination
Office of the Governor
P.O. Box 110030
Juneau, Alaska 99811-0030

Re: Comments on proposed changes to Consistency Review Regulations: 6 AAC 50

Dear Mr. Bates:

Thank you for the opportunity to comment on the proposed consistency regulations for the Alaska Coastal Management Program (ACMP). As you know, these regulations are critical to the continued exploration, development, production and transportation of Alaska's oil and gas resource.

This letter and attached comments represent the views of the Alaska Oil & Gas Association (AOGA). AOGA is a private, non-profit trade association whose member companies represent the majority of oil and gas exploration, production, transportation, refining and marketing activities in Alaska.

Virtually all of the oil and gas exploration, production, transportation and refining activity, and key elements of the pipeline activity in the State of Alaska, take place in coastal districts. Industry permitters and environmental staff work regularly with coastal districts, state and federal agencies and Division of Governmental Coordination (DGC) personnel. Company permitters have day-in, day-out experience with the 6 AAC 50 regulations. We know what works and what doesn't work in the consistency process. We appreciate this opportunity to work with the DGC and the Coastal Policy Council (CPC) in taking the first new look at the coastal management consistency regulations in 17 years.

The proposed new title for 6 AAC 50 is: "Alaska Coastal Management Program (ACMP) Implementation". This is an accurate description of what these regulations do — they

"implement" the coastal management program. They are the *directions* for how to make the ACMP work - the *directions for decision-making* to the resource agencies, the coastal districts, the DGC and the permitted public. As with any set of directions, the clearer they are, the better the program will work.

The first stage of this comprehensive revision endeavor—the internal agency/DGC/coastal district stage –has taken a lot of time. DGC personnel have said that the internal agency working group and/or DGC personnel have met almost every two weeks for the last two years. The internal draft has gone through at least two major rewrites - and this is before the public comment period even opened.

The original regulations have been in place since 1984. Almost immediately it became evident that there were various problems, some serious, with interpretation and application. Public policy questions as to effects of certain sections on other state statutes, legal ambiguities arising from vague language, individual agency permit timelines that were never reconciled with the consistency timelines, and just the plain practical difficulties of applying seemingly mutually exclusive requirements have continued to cause time-wasting internal agency disputes, and disagreements with coastal districts and the permitted public. These disputes have had increasingly troublesome effects: agencies and DGC gridlocked in reviews of the ABC List and there have been some noticeable slow downs in the permitting process.

Since 1984 various proposals for changes in these regulations have been made, many by agency or DGC permitters who are tasked with "making this work". You have pointed out you have "stack of files" on your desk from 1984 "when folks started proposing changes to these regulations". Several attempts at a complete revision process have failed. Different reasons are given for this failure: simply a lack of time or focus by administrations; or the fact that some interest groups and agencies benefit from ambiguous language and maneuver to retain it; or the lack of political will to make those few critical decisions that have plagued the consistency process almost since its inception.

The consistency process has "worked" through those years because it has been patched together with agency "guidance policies", Memorandums of Understanding (MOUs), ad hoc opinions from assistant attorney's general, internal memorandums, unwritten "but understood" practices, and most especially, the good judgment of individual agency staff and DGC coordinating staff. The irony has been that the most public of process...the coastal management program...has been implemented by the most subjective and internalized practices, in part because of the ambiguities of its 6 AAC 50 regulations.

AOGA recognizes the achievement of Director Patrick Galvin, coordinator Randy Bates, and the CPC members for initiating this first formal review and revision of the consistency regulations. It is important that this process does not fail. It is important that these revisions resolve the long-standing issues, rather than just bury them under more vague language. It is important that practices that have arisen out of institutionalized "understanding" or internal unpublished memoranda are examined. It is important that public policy issues be identified and options provided to the CPC for resolution. It is important that we take this opportunity to make the

implementing directions for the ACMP clear and precise or the agencies will spend the next 17 years writing new "guidance policies", new Memorandums of Understanding, and new internal memorandums. The test for these regulations will be whether or not they are so clear that all past "guidance policies", MOUs, etc., can be thrown out and these published, *public* regulations will be the reliable guide for consistency decisions.

In this submittal letter, AOGA will offer recommendations on the "next steps" of this regulation process; highlighting, in summary, the strengths and the weaknesses of the proposed regulations. Our detailed comments are attached.

Recommendations for "Next Steps" in the Process

In summary, those recommendations are: (1) that individuals in the agencies with direct project permitting experience be assigned to the working group charged with the review of public comments; (2) that the working group to review the public comments be expanded to include knowledgeable public representatives; and, (3) that after the public comments are considered, the regulations be re-issued for a second public review.

We also suggest that when the regulations are re-issued, DGC identify the public policy and legal issues and include a section-by-section public roundtable discussion with the CPC so the public and council members can hear the pros and cons of policy and/or legal alternatives offered.

AOGA's first recommendation is that agency personnel with direct permitting experience be part of the team that reviews public comment.

Does it make any difference whether or not the regulations governing the permitting of projects in the coastal zone are reviewed by individuals with direct permitting experience?

We have found that it does. These are the "working" regulations of the entire coastal management program. The goals of these regulations are to establish a "solid platform for implementing the ACMP"; to create a "predictable review process"; to "establish and clarify the process" and to "provide up to date regulations that are clear and efficient." Alaska has a complicated dual permitting system with ACMP overlying and intertwined with local, state and federal permitting systems. Alaska has a "networked" system which simultaneously is supposed to protect the authority of each individual agency *and* the enforceable standards of the coastal districts. The inherent conflict means reaching a balance is a complicated process. A regulatory section that "sounds good" may have unintended consequences on the rest of the regulatory system, disrupt the balance or simply be unworkable from a practical standpoint.

We have found in our own industry review of these regulations that individuals who have been directly involved in the dozens...or sometimes hundreds...of decisions, negotiations and timing issues related to permitting a project have a different sense of both "predictable" and "efficient" than individuals who have never been involved in the actual permitting of a project. We found this difference in perspective even between industry personnel with *direct* permitting experience

and those industry planners, managers and attorneys who have indirect experience *reviewing* permit actions.

The challenge for the team reviewing the public comments and for CPC members, many of whom (like most of us) have not been directly involved in project permitting, will be to sort through the "sounds good" from the "works as intended". Our understanding is that this draft of project permitting regulations was drafted internally by agency personnel with limited or no *direct* project permitting experience in their own agencies. Based on our own experience, we are recommending that the upcoming working group to review public comment consciously include agency personnel with direct project permitting experience.

Second, we recommend that knowledgeable public members be appointed to the working group to review these public comments. Such task groups or stakeholder groups have been established in the past with good results. It seems to us that there must be some real interaction and working through of approaches if these regulations are to meet the goals of this project. AOGA will make a formal request to the Director of DGC that such a task group be established.

Third, AOGA recommends that after the public comments are considered, the regulations be revised and reissued for a second public review. If the revisions address the questions that need to be answered in this regulation, both the agencies and the public will have a strong interest in a second round of comments. The agency internal review took almost two years. The public review should not be hurried when there is no need to do so and when the end product will certainly be affected.

Finally, as a subset of what we believe may be useful, AOGA suggests that when the regulations are re-issued, DGC identify the public policy and legal issues addressed or involved. Many of the issues have statewide or program wide public policy implications. Issues with these implications should be identified, along with a range of options and preferred options.

We also suggest that in the second round of public comment, the CPC hold a section-by-section roundtable discussion with the agencies and the public so all parties can have the benefit of hearing different perspectives.

We suggest "section by section" review by the CPC because, from our own experience, it became evident that there is simply no way to make a considered judgment without one. From a practical standpoint, we would also recommend at least two half-day sessions, although four half-day sessions would be more reasonable given the complexity of these regulations.

Strengths of the Proposed Implementing Regulations

The format of the proposed regulations—breaking them out into Articles of general applicability—is a long needed structural change. The attempt to more clearly define public participation as well as spell out the steps in the elevation and review process, while needing both clarification and legal review, are important. Of particular concern is the lack of standards for elevations and the question of how elevation decisions are made. It appears to us that decisions must be made both at the director and the commissioner level through a vote. It also

seems that an agency should not be able to elevate the same issue more than once. The appeal process also needs more thought. It would be useful to do a flow chart for the elevation/appeal/ petition process. The challenge will be to protect all parties rights without making the ACMP the target of choice of special interest groups.

Two new sections are of significant importance: Article 7 (General and Nationwide Permits, Categorically Consistent Determinations, General Consistency Determinations, and General Consistency Concurrences) and Article 8 (Project Modifications and Renewals of Authorization.) Both have been an area of agency gridlock. Both are essential to the project consistency system. Both articles need extensive review, discussion and explanation. Definitions are needed for all of the Article 7 sections. The ABC List has been a matter of internal agency dispute. Three years ago DGC issued a "white paper" on some of the ABC List issues. Other agencies may or may not have responded. In order for there to be a public discussion and resolution of these issues they have to be clearly identified. It would be helpful if DGC would identify internal agency issues. Of equal value would be definitions/standards for the A List, B List, C List and the other categories included in Article 7.

Weaknesses of the Proposed Regulations

As a general comment, these proposed regulations, like the current regulations, still fail to clearly define how the coastal consistency review process is supposed to work. During the public workshops it was evident that even industry permitters, who are knowledgeable with the program, were confused. There seems to be the same confusion among agency personnel who will be charged with implementation. There is no question that this is a complicated program dealing often with complex projects. This makes it all the more necessary that the *working direction*, these regulations, be as clear as possible.

In key areas the language and standards of the regulations are even more subjective, vague and undefined than the current regulations. The response to this criticism at workshops was to rely on the "good judgment" of the program administrators. This is an unacceptable approach. It does not provide a standard for decision-making; continues to leave the process open to legal challenges and agency gridlock; and diminishes the ability of the program to protect and maintain coastal resources and uses. The areas of greatest concern are listed below:

- <u>The proposed regulations fail to resolve the traditional conflicts of the consistency process</u>**.** The most serious and disappointing weakness of the proposed regulations is that they simply fail to resolve the traditional conflicts of the consistency process: applicability, scope of review, jurisdiction, timing, "homeless stipulations" and coordination. For instance:

  (a) Current ambiguous language concerning applicability of the ACMP and scope of review has become even more vague. The single most important goal of implementing regulations must be to clarify applicability of projects to consistency review.

  (b) The proposed regulations do not clarify how Alaska's "networked" system works in practice and more seriously, do not solve the timing issues related to coordination of

some permits that, in actual fact, defeat the entire concept of a "networked" program. The relative roles, responsibilities and authorities of the agencies and DGC, vis-`a-vis a "networked" review, is not at all clear, nor is there resolution of the timing issues related to coordination of some permits, notably Alaska Department of Environmental Conservation (DEC) air quality permits and Department of Natural Resources (DNR) right-of-way leasing. If agency permits do not have timelines that fit within a 30 or 50-day schedule, there can be no "networked" program. This is an issue for both small and large projects.

(c) The role and authority of coastal districts, as described in these proposed regulations, is more subjective and thus more uncertain. The proposed regulations embody an expansive, undefined scope of local coastal program jurisdiction which needs to be examined in terms of the enabling statutes and overall public policy.

(d) The proposed regulations codify the practice of adopting homeless stipulations (called "alternative measures" in the regulations). This practice raises both public policy and legal questions. This is a critical issue for the ACMP. There is no question that coastal districts have the right and responsibility to develop enforceable policies. This is the heart of the program. What is questionable are the implementing practices that have slowly developed through the years. This regulatory review provides the opportunity for open discussion on homeless stipulations.

- The proposed regulations adopt a permit coordination approach that decreases rather than increases the predictability of the process. Under these proposed regulations there is no assurance that the review will be concluded and permits issued by a certain date**.** Again, there is no question that some projects offer special challenges, however the attempts in these proposed regulations to satisfy "time out" concerns of some agency staff members have, in cumulative effect, derailed the entire process. For instance:

(a) Previously established timelines are simply lost in the multiple exceptions. The timelines for federal projects are now more certain than the timelines for state projects.

(b) The proposed regulations "front load" the application process (and make it uncertain to predict when "day one" starts) and at the same time allow even more extensions and agency requests for "additional information" during the rest of the process, which almost always stops the clock yet again.

Predictable permitting and predictable timelines are a "make or break" issue. The working season, particularly on the North Slope, is so short that if permits are delayed it can mean the entire "season " is lost. And that may mean the project is lost. The importance of this issue cannot be over-emphasized.

None of the issues addressed by these regulations are easy issues. All have been areas of serious controversy among agencies. The importance of this regulation project is that, for the first time

in 17 years, these controversies are now in the public arena and can be resolved.

We look forward to working with you on these issues.

Thank you for your consideration of these comments.

Sincerely,

JUDITH BRADY
Executive Director

Attachment

ARTICLE 1. PROGRAM ADMINISTRATION [CONSISTENCY DETERMINATION AND REVIEW]

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.005. **APPLICABILITY OF THE ACMP CONSISTENCY REVIEW PROCESS.**

AOGA Comment

6 AAC 50.005 is the first of the five key elements necessary to meet the DGC goal to "establish and clarify the process to evaluate a proposed project against coastal program enforceable policies."

This section establishes the criteria or threshold for deciding whether or not a project is subject to the consistency review process. This basic public policy question regarding the scope of concerns that are to be addressed through Alaska's coastal program was decided by the Legislature when it adopted the Alaska program in 1977. The applicability language adopted by the Legislature was based on their understanding that the federal Coastal Zone Management Act never intended the program to apply to every activity in a coastal region, nor did it require that state programs do so. The federal standard for state programs set forth in the Coastal Zone Management Act at 16 USC 1455(c)(2)(B), and federal regulations at 15 CFR 923.3(b) and numerous other places in that chapter, is "*direct and significant impact*."

> **"***The management program must provide for the management of those land and water uses having a direct and significant impact on coastal waters...*" (15 CFR *923.3(b).*

This was also the language used by the Alaska Legislature in the findings for the initial enactment of the ACMP:

> "It is the policy of the state to...develop a management program which sets out policies, objectives, standards and procedures to guide and resolve conflicts among public and private activities *involving the use of resources which have a direct and significant impact on the coastal land and water of the state***"**. (Ch. 84, sec. 2(3), SLA 1977. See AS 46.40.210(5).

The qualifying term in the federal requirement for certification of state programs and the qualifying term in their statement of policy adopted by the State Legislature in approving the coastal management program for Alaska is "uses of direct and significant impact." It identifies

the scope of concerns which are to be addressed through the coastal program.
The applicability language proposed in the draft regulations is a major departure from language in the federal statutes and in state policy. Instead of using the *impact* of an activity on coastal land and water as the criteria for applicability, the proposed language uses the mere fact that an activity is taking place within a coastal area as the criteria for applicability. This represents a significant shift in the authority and intent of the ACMP. Under the proposed definition, any project "*that may affect* any coastal use or resource" is subject to the consistency review process. If this language is adopted, there is no standard for identifying the scope of concerns, which are to be addressed through the coastal program. Every activity in the coastal zone becomes subject to consistency review.

It is noted that the proposed "may affect" language to determine applicability is even broader than the relevant section of the new CZMA Federal Consistency Regulations (15 CFR 930.33(a)(1), which states: "Effects are determined by looking at reasonably foreseeable direct and indirect effects on any coastal use or resource." The State program is not required to follow the federal criteria, and in fact, as pointed out above, is in compliance so long as the applicability criteria addresses "use of direct and significant impact". The question of when Alaska's program can and/or should depart from federal policy and regulations in order to meet the state's own program needs can only be based on a section-by-section analysis. In this section, the state has already established its policy as to applicability and is not required to adopt the federal regulatory language.

The standard "direct and significant use" should be used consistently throughout these regulations.

Establishing a clear standard for applicability also involves *identifying* those permits and authorizations that are subject to consistency review. It appears that identification of permits and authorizations subject to consistency review will be listed in the proposed 6 AAC 50.750. AOGA strong supports this listing. The challenge in consistency reviews is distinguishing between the routine and significant. This challenge will be resolved with a listing. The section should also be cited in .005. If permits and authorizations subject to review are not going to be listed in Article 7, they should be listed in this section.

AOGA proposes the following language for 6 AAC 50.005(a):

6 AAC 50.005. APPLICABILTY OF THE ACMP CONSISTENCY REVIEW PROCESS. (a) A project that ~~may affect~~ has a direct and significant impact on any coastal use or resource is subject to the consistency review process as described in this chapter ~~and~~ when ~~any activity that is~~ a part of the project

(1) requires a resource agency permit or authorization as identified in 6 AAC 50.750;
(2) is a federal activity;
(3) requires a federal authorization as listed in 6 AAC 50.405; or
(4) is an Outer Continental Shelf (OCS) exploration or development production plan.

(b) activities excluded by federal statute or regulations are not subject to review;
(c) ~~(b)~~ Only one consistency review process applies to a project. The consistency review

process, etc. *No further changes proposed*.

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.025. SCOPE OF PROJECT SUBJECT TO CONSISTENCY REVIEW.

AOGA Comment

In tandem with the "applicability" section, .025 on the "scope" is the second key to meeting the DGC goal to establish and clarify the process to evaluate a proposed project.

This section raises two fundamental questions, the first dealing with agency involvement and the second dealing with what activities involved in a project are subject to review. These have also been long-standing areas of misunderstanding and dispute. The adoption of precise language in this section should complete the need for clarity on scope of review. This section also provides an opportunity to involve the applicant in a more useful way.

We have two proposed changes for this section:

First, we recommend revising Subsection (a) to clarify that the agencies involved in the consultation should be those that require a permit or authorization, and second we recommend including the applicant in the consultation to determine scope of review.

The regulations should clearly limit the consultation on scope to the agency or agencies requiring a permit. The proposed language is vague and could be interpreted to require consultation with every resource agency in every review. During the development of these regulations a question was raised as to agency participation in consistency reviews. A February 2000 internal draft proposed that section .030, then entitled "State Resource Agency Coastal Program Implementation", include a section (b) which stated: "Each resource agency shall participate in a consistency review by evaluating a proposed project for consistency...", A Department of Law note in the 2/15/00 commentary (page 4) referencing this proposed new language states:

> "*A question was raised as to whether ACMP statutes and regulations require a resource agency without a permit to evaluate a project for consistency and submit comments. The answer is the state may choose to require all agencies to participate but it is not mandated by statute. However, a resource agency with a permit must evaluate a project for consistency in addition to evaluating a project for compliance with their permitting authorities."*

The proposed language in the 2/15/00 draft has been deleted in this draft, but the inclination to include all agencies regardless of direct involvement apparently lingers on. The law is clear that only those agencies having permits or authorizations have to participate in a consistency review. To be vague about this basic issue of agency participation is to defeat the goal of clarity and to invite further dispute. To include agencies without permits and authorizations would be time-consuming without adding value to the consistency process.

We also recommend that the applicant be included in the consultation process. The final scoping decision would not be compromised by including the applicant in the process, because it is the coordinating agency that makes the final decision. We believe it will be useful and ultimately timesaving to have the applicant as part of the consultation process because scoping-related questions can be answered "on the spot".

Subsection (b) as proposed is troublesome, first because the use of *authorization* in Subpart (b)(1) as defined in 6 AAC 50.990(a)(8) creates a situation where certain agency authorizations, which have never been subject to consistency review in the past, will now be subject to review. There is no language to give an agency the discretion to discriminate between activities that must be reviewed and those that would not require review. The challenge again is to distinguish between the routine and the significant.

We are not proposing a change of language in (b); we are pointing out that the language as proposed will only work as a clear direction for determining scope if other sections of the regulations, particularly the definition of authorization, is made clearer.

The problem is that a number of terms referencing differing degrees and kinds of agency action are used throughout these regulations. If every single possible action is not to be included (and there is no requirement or intent in state or federal law that they should be) then there must be a list of permits and activities subject to consistency or there must be a clear standard or a clear definition. We are recommending all three; however, having tried our hand at developing a clear definition, we have concluded that listing the permits and authorizations that are subject to consistency in Article 7 is the best answer to achieve clarity.

Subsection (b) is also troublesome because proposed Subpart (b)(3), that includes *any activity regardless of whether it requires an authorization,* is unlimited in scope. There is simply no legal or practical basis for expanding the reach of the ACMP in this manner. This proposed language represents a major departure in public policy and should be deleted.

This section should tie the scoping decision to the standard set out in .005: "*activities that have a direct and significant impact on coastal uses or resources".*

AOGA proposes the following:

6 AAC 50.025. Scope of Projects Subject to Consistency Review. (a) The coordinating agency, in consultation with the applicant and any resource agency that requires ~~an authorization~~ a permit or authorization, shall determine ~~the scope of the~~which project activities are subject to a consistency review**.**

(b) Except as provided under AS 46.40.094, the scope of ~~the project subject to consistency review must include~~ a consistency review shall include any activity subject to a consistency determination under 6AAC 50.005 to the extent that activity has a direct and significant impact on a use or resource within the coastal zone. Such activities must include

(~~1~~) each activity that requires a federal or state agency permit or authorization~~;~~.

~~(2) the use associated with an activity for which an authorization is required~~;

~~(3) any activity, regardless of whether it requires an authorization, without which the project, as proposed, could not be conducted; and~~

~~(4) a federal activity. (Eff. ___/___/200__, Register ___)~~

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.035. DIVISION OF GOVERNMENTAL COORDINATOIN (DGC) RESPONSIBILITY.

AOGA Comments

This section provides the third key element necessary to achieve the DGC goal to establish and clarify the process to evaluate a proposed project against coastal program enforceable policies. This section, along with .045, which *should* describe the responsibilities of the resource agencies and .055, which *should* describe the responsibilities of the coastal districts, provides the directions for a networked program. These sections, in combination, should be so clearly written that they eliminate the need for the multitude of internal agency policy guides and memoranda that have been used to provide direction for the program.

Section .035 provides the opportunity for long-needed identification of the role of DGC in the implementation of the ACMP. The questions pertaining to the authorities and responsibilities of DGC are central to an efficient networked system. This section should answer every question as to when DGC has the responsibility to make the final decisions directly related to consistency. This section should also address issues arising from differences in the decision matrix for projects involving only state permits from those involving both federal and state permits.

First, because the federal consistency requirements are different than those of the state program, AOGA recommends that this section separately identify the responsibilities of the DGC for projects involving only state permits and those involving federal permits.

Second, if a complicated networked program is to work efficiently, the decision-making process must be clear. We recommend that this section identify, in detail, the decision-making responsibilities and authorities of the DGC. The coordinating agency must have the authority to make decisions directly related to state standards and district enforceable standards for consistency purposes. There will always be tension between the districts' and agencies' sense of their own authority and that of DGC. This section provides the opportunity to identify those decisions that clearly fall to DGC as "project manager" for the consistency process.

Third, we recommend that it be made clear that DGC has the responsibility of reviewing districts' enforceable standards to ensure that they meet statutory and regulatory requirements. As has been widely acknowledged, there is an existing problem with the broadness and vagueness of many such policies as currently drafted. Constitutional restrictions on vagueness generally apply when a law is so vague that the person subject to it does not know what conduct is required to conform to the law and the enforcing authority is vested with arbitrary power to enforce. Enforceable policies that do not meet statutory and regulatory standards should not be

used as the basis for consistency stipulations.

Under this responsibility for review, DGC should notify districts of those enforceable policies that do not meet the requirements so the district can revise and submit them to the Coastal Policy Council for approval. This is an important issue because of the deference given coastal districts in the application of their enforceable policies.
AOGA proposes the following:

6 AAC 50.035. DIVISION OF GOVERNMENTAL COORDINATION (DGC) RESPONSIBILITY. (a) The DGC is the designated state agency under section 306(d)(6) of the Coastal Zone Management Act of 1972, 16 U.S.C. 1455 (CZMA), as amended. As the designated state agency, DGC is responsible for

(1) commenting on and concurring with or objecting to federal consistency determinations and negative determinations for federal activities and consistency certifications for federal authorizations and Outer Continental Shelf (OCS) plans. In regards to the above federal actions:

(A) DGC is the only state agency designated to comment on, concur with, or object to a federal consistency determination or negative determination or an applicant consistency certification for a federal authorization.

(2) securing and coordinating, within the required time periods, the required ~~necessary~~ review and comment from

(A) resource agencies;

(B) coastal resource districts; and

(C) the public.

(3) coordinating the consistency review and issuing a consistency determination for a project that requires an authorization from two or more resource agencies. As the coordinating agency, DGC shall, in writing, and after consultation, as required, with the authorizing resource agencies, the affected coastal district and the applicant,

(A) determine whether or not the project, or any part of the project, is subject to consistency review under the standards in 6 AAC 50.005 and 50.025;

(B) determine whether or not a project or parts of the project meets the criteria for a negative determination authorized in 6 AAC 50.285;

(C) determine whether the project is a matter of state concern;

(D) determine which coastal district or districts are affected by the project;

(E) determine whether the application package is complete for purposes of starting the clock for a consistency review;

(F) determine whether the project meets the requirements for a 30 or 50 day review;

(G) establish comment deadlines for the resource agencies, coastal districts and the public pursuant to authorizations in this Chapter and establish a protocol for ensuring that comment deadlines are met;

(H) determine whether a consistency stipulation is necessary to meet a state standard or a district enforceable policy. In making this determination, DGC shall evaluate whether the enforceable policy relied upon meets statutory and regulatory requirements;

(I) determine whether requests for additional information pertaining to the consistency are timely and justified;

(J) determine whether requests to stop the clock, when such requests pertain to consistency issues, are justified.

(4) DGC shall, in consultation with the Department of Law, review the enforceable policies of each coastal district incorporated into the ACMP to determine whether or not such policies meet applicable statutes and regulations. If an enforceable policy is out of compliance, the DGC shall notify the district of such noncompliance and shall not use such a policy in consistency determinations until such time until the policy has been revised and approved by the Coastal Policy Council

Note: All the other responsibilities in this section would remain as proposed.

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.045. RESOURCE AGENCY AUTHORITY.

AOGA Comment

This section provides the fourth key element necessary to achieve the DGC goal to establish and clarify the process to evaluate a proposed project against coastal program enforceable policies. A networked program can only succeed if the responsibilities of all the parties are clearly understood. This section, as proposed in the draft regulations, would indicate that the resource agencies have *no* responsibilities in Alaska's networked program.

AOGA recommends that this section be re-titled to reflect that resource agencies do have a responsibility in Alaska's networked program and that those responsibilities be clearly identified in this section. It is our interpretation that under the requirements of Alaska's coastal management program, state agencies have the obligation to conform their permitting timelines to those of the coastal consistency program. In so far as the individual agency permit timelines and the coastal program consistency review timelines do not work in tandem, there can be no networked program. We are recommending that resource agencies review their permit authorities and open their regulatory processes to reconcile the discrepancies that exist.

AOGA proposes the following:

6 AAC 50.045. RESOURCE AGENCY ~~AUTHORITY AND~~ RESPONSIBILITY

Nothing in this chapter displaces or diminishes the authority of any state agency with respect to land and resource management of coastal zones ~~coastal uses and resources~~. (Eff.__/___/200__, Register.

(a) Uses and activities authorized by state agencies must be consistent with the applicable district program and State Standards;

(b) Each resource agency will review and take appropriate action to coordinate their regulatory and permitting procedures with those of the ACMP consistency review procedures of this Chapter.

(c) A resource agency that has a required permit, lease or authorization for a project with a direct and significant impact on a coastal zone shall participate in a consistency review for that project in addition to evaluating the project for compliance with the agency's statutes and regulations;

(d) an agency that has a required permit or authorization shall participate in the consistency review by:

(1) evaluating a project for consistency with applicable ACMP standards contained in 6 AAC 80, as amended, and applicable coastal resource district enforceable policies;

(2) submitting timely consistency review comments regarding the project's consistency to the coordinating agency . Such comments shall:

(a) briefly explain why the agency believes a project is consistent or inconsistent with applicable ACMP standards and an affected coastal resource district's enforceable policies within the agency's area of expertise;

(b) describe any mitigating measure the agency is recommending to ensure the project is consistent with the state standards;

(c) provide a justification, based on ACMP standards for any mitigating measure recommended to ensure the project is consistent; and

(3) expediting the agency's own permit review procedures, to the extent permitted by law, by coordinating their own procedures with the consistency review of a project.

(e) a resource agency shall coordinate the consistency review and issue the final consistency determination for a project requiring a permit, lease or authorization from one state agency. The agency may coordinate the review itself and issue the determination in the manner provided in this chapter. An agency or applicant may request that the Division of Governmental Coordination act as facilitator for such review.

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.055. COASTAL RESOURCE DISTRICT RESPONSIBILITY.

AOGA Comment

This section provides the fifth key element necessary to achieve the DGC goal to establish and clarify the networked process to evaluate a proposed project against coastal program enforceable policies. The issues related to coastal districts have revolved around the vagueness of some enforceable policies and the adopting of so-called "homeless stipulations".

The Coastal Policy Council has addressed the need to make district enforceable standards specific. This issue of when or how or whether "homeless stipulations" can be applied to projects requires review by the Coastal Policy Council, the state resource agencies, the coastal districts, the Department of Law and the public.

These regulations provide an appropriate time for the discussion and review of enforceable policies because for the first time, under the proposed regulations, ACMP formally recognizes "homeless stipulations" under the term "alternative measure". While in the past homeless stipulations have been attached to permits "as a matter of practice", the practice becomes a matter of regulation.

The problem is twofold: (1) some of the enforceable policies are so vague that they have no meaning, and yet are used as the basis for imposing additional stipulations to projects; (2) some of the stipulations proposed, the so-called "homeless stipulations" are outside the regulatory or statutory authority of state resource agencies and also outside the statutory and regulatory authority of the municipalities or boroughs in the coastal districts. The question then becomes, who will implement? The "homeless" designation comes from the question of who can implement a stipulation outside their jurisdiction? A second problem is that there are no defined standards or limits for the imposition of such "homeless stipulations".

To begin with AGOA is recommending that " consistency stipulation" be substituted for "alternative measure". Stipulation is a term of art that implies authority and standards. "Alternative measures" implies a practice outside legal authority and standards. The term "consistency" ties the stipulation directly to a consistency determination.

Alaska made the decision not to implement its coastal program through a separate coastal zone permit, but instead choose to implement its coastal management program through a "networked" program of agency and coastal district participation. In states having a separate coastal zone permit program, new conditions and stipulations outside local government jurisdiction or state statute authority are submitted to a regulatory process, adopted in public process and implemented by the coastal zone office. Under Alaska's networked program the legal authority and standards for conditions and stipulations lay with the *already existing* agency authorizations and local government authorities.

While "homeless stipulations" have been attached to consistency reviews in practice it is questionable whether there is authority to impose stipulations that are outside the authority of agency statute and regulations, nor is there authority to require an agency to implement stipulations outside its statute and regulations. It is also questionable as to whether this is good

public policy.

These regulations provide the opportunity to "do it right" in the future.

AOGA proposes in 50.035 that DGC has the responsibility to review enforceable policies to ensure that they meet statutory and regulatory requirements. Under this proposal, when a consistency stipulation is proposed, DGC would routinely check to determine that the enforceable policy on which it is based, meets statutory and regulatory requirements. If the enforceable policy did not meet these requirements, it could not be used as a basis for a consistency stipulation. We also recommend that the practice of homeless stipulations end. It is an ad hoc practice and is not necessary. Local governments *choose* whether or not to have planning and zoning powers, which gives them ability to implement stipulations for their enforceable policies. If they choose not to have such powers, then they can implement their enforceable policies through the regulatory authorities of state agencies. Stipulations outside local government authority or state agency authority should not be considered.

These recommendations do not diminish the importance and role of the coastal districts. It is clear that a coastal district may properly add stipulations for which it has authority under its Title 29. We recommend that this authority be recognized in this section. Consistency stipulations related to district enforceable policies that are authorized under the district's Title 29 authority, should be implemented by the local government of the district.

We are also recommending that the regulations reflect the fact that while all coastal districts have expertise in local conditions, uses and activities subject to their own program, some coastal districts do not have expertise in interpreting and applying their enforceable policies because their policies are simply so vague and broad that a specific interpretation is not possible

There are several reasons why (b)(1) should be revised. The language "expertise in the interpretation and application of its program" affords close to unreviewable and un-challengeable deference to local districts as to the *legal* meaning and application of enforceable policies. As has been widely acknowledged, there is an existing problem with the broadness and vagueness of many such policies as currently drafted. Pre-determining a district "expert" in the legal meaning of a broad and vague enforceable policy risks violating constitutional restrictions on vagueness. These generally apply when a law is so vague that the person subject to it does not know what conduct is required to conform to the law, and the enforcing authority is vested with arbitrary power to enforce.

While local districts certainly should be given deference to their knowledge of local conditions, the district program enforceable policies *must* be drafted in a specific fashion such that anyone can understand their scope and effect. The current "expertise" language exacerbates the problem of badly drafted enforceable policies by establishing that such a policy means what the district says it means.

AOGA proposes the following:

6 AAC 50.055. COASTAL RESOURCE DISTRICT RESPONSIBILITY.

(a) A coastal resource district in which a project with a direct and significant impact on its coastal uses and resources is proposed, may participate in a consistency review under this chapter by submitting comments to the coordinating agency regarding consistency of the proposed project with ~~the~~ its enforceable policies ~~of the ACMP~~.

(b) A coastal district shall review its enforceable policies to ensure that they meet the applicable statutory and regulatory requirements.

(c) A coastal resource district whose program is incorporated into the ACMP

(1) is considered to have expertise in ~~the interpretation and application of its program~~ local conditions, uses and activities subject to its program; and

(2) may recommend to the coordinating agency consistency stipulations tied to specific enforceable policies and authorized by agency statute and regulation; and

(3) may include ~~an alternative measure identified in a final consistency determination issued under 6 AC 50.265 in an authorization for the project that is issued~~ a consistency stipulation tied to enforceable policies for the project ~~that is~~ which may be issued under the coastal resource district's Title 29 authority. (Eff. ___/___/ 200__, Register ___)

Authority: AS 44.19.160 AS 46.40.040 AS 46.40.090

ARTICLE 2. STATE CONSISTENCY REVIEW PROCESS [PETITIONS TO THE ALASKA COASTAL POLICY COUNCIL]

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.200. APPLICABILITY.

AOGA Comment

This section should be deleted as duplicative with .005, or the language made consistent. The text should be revised to specify that activities that are subject to review are those that have *a direct and significant impact on any coastal use or resource.*

AOGA proposes the following:

6 AAC 50.200. APPLICABILITY. ~~An activity that will likely affect~~ A project that has a direct and significant impact on a coastal use or resource and that requires a resource agency authorization must be conducted in a manner consistent with the ACMP. The consistency review process described in this article applies to ~~a project likely to affect a coastal use or resource~~ such project or part of such project when ~~at least one activity that is part of the project requires~~ an authorization from one or more resource agencies is required and when the project is not subject to the consistency review process under 6 AAC 50.305-.395 or 6 AAC 50.405-.495. (Eff. ___/___/200__, Register ___)

Authority: AS 44.19.145 AS 46.40.020 AS 46.40.096
AS 44.19.160 AS 46.40.040

Note: As a general comment, Article 2 should contain provisions for an applicant to provide DGC with a negative determination. AOGA has added such a provision to this Article by recommending language for a new .285. The requirements are similar to those found in the proposed 6 AAC 50.395. The review of the negative determination should be made part of the 6 AAC 50.225 (Determination of Completeness and Notification to Applicant) review (as modified) described below. If DGC did not concur with the determination, the project would be subject to Article 2 review requirements.

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.210. COASTAL PROJECT QUESTIONNAIRE

AOGA Comment

To be consistent with .005, in (a) change, "activity that is likely to affect" to "has a direct and significant impact."

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.216. PRE-REVIEW ASSISTANCE.

AOGA Comment

It continues to be troublesome that coastal district boundaries and enforceable policies are so vague that they cannot be readily identified in the pre-review stage. Instead, each offer to provide such information is prefaced with "to the extent feasible". The need for "identification of coastal resource districts that may have an interest in the project" and "to the extent feasible, identification of applicable enforceable policies" [(c)(2) and (3)] demonstrate the extraordinary vagueness of the jurisdictional reach of coastal district programs and of their enforceable policies. These should be extremely clear from the definition of district program boundaries and the definition of enforceable policies.

The need for identification of "possible study requirements" necessary to determine consistency with enforceable policies, coastal program issues, and potential mitigation requirements is also troublesome. Are "possible study requirements" something in addition to ACMP review? The wording needs to be more helpful and exact.

Subpart (c)(2) needs to be consistent. The reference should be "identification of a coastal resource district~~s~~ that may ~~have an interest in the project~~ become a review participant due to a direct or significant impact on that district;"

Subpart (c)(7) needs to be reworded to indicate who may authorize studies: to the extent feasible, the identification of ~~possible study requirements necessary to~~ mandatory studies that may be required by applicable resource agencies to determine consistency with ~~enforceable policies, coastal program issues,~~ ACMP standards or agency permits, and potential mitigation

requirements.
Subsection (e) should be deleted or changed. Unless the DGC is certain of which coastal district shall be directly and significantly impacted, it is too early for a general invitation. The mandatory language "*shall invite"* could be misinterpreted that the coastal district representative must be accommodated, such as by travel arrangements or other means to encourage attendance at an assistance meeting. AOGA believes that if DGC is certain which coastal district is affected, contact by phone, fax, or email is more appropriate than *invite*. Also because not all projects require other district representatives to be contacted for a pre-review assistance meeting, AOGA believes it is more appropriate to state that DGC *may invite* a coastal program representative (rather than "shall").

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.220. APPLICANT CONSISTENCY REVIEW PACKET.

Subpart (a)(1)(A) strike *detailed.* The requirement is covered by the use of the word "complete".

Subpart (a)(1)(C) should be deleted or explained. Is "comprehensive data and information sufficient to support the applicant's consistency certification . ." different than information previously or concurrently submitted for any necessary agency permits? If so, how is the scope of this information to be determined? The requirements to submit a project description are covered in subpart (a)(1). The completeness of the packet is covered in 6 AAC 50.225. The initiation of the review is already covered in 6 AAC 50.240. We are reviewing to determine if "held in confidence by law" ((2)(e)) is sufficient.

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.225. DETERMINATION OF COMPLETENESS AND NOTICE TO APPLICANT.

AOGA Comment

Certainty in starting time, definite time lines, and "the clock" are the only assurances a permitter has under the ACMP program. The language, *as soon as practicable* in Subsection (a), does not require the reviewer to begin a project in a timely fashion. AOGA recommends *within 7 days* as reasonable.

AOGA is recommending an important change in the determination of completeness. We have commented earlier that the difference in time requirements for some agency permits and the DGC 30 and 50 day review effectively means there is no "networked" review under the ACMP for those projects requiring one of these permits. We have recommended that agencies review their permit schedules and begin the process of updating their regulations to correspond with ACMP reviews. At the same time, it is important to rethink what is needed for a consistency review in those cases where the ACMP Standards adopt certain agency actions as automatically

consistent once the permit or authority is issued.

The most significant problem relates to long lead-time permits (such as air permits). This is an issue for both small and large projects, and has not been resolved by the new regulations.

Basically, the entire review process cannot be initiated until the details of a technically complex review are nearly resolved. We suggest that this level of review is not needed to meet the statutory goals of the consistency review process. Instead, the requirement for starting review should be that all permit applications have been submitted and are deemed sufficient for a review to determine potential coastal zone effects. The current process requires details of modeling and air quality monitoring to have been worked to a draft permit level of detail prior to starting review for all other permits.

The sequence for air permits is as follows:

18 AAC 50 Air Quality Control regulations state
18 AAC 50.315 CONSTRUCTION PERMITS: REVIEW AND ISSUANCE. (a) Action on Construction Permit Applications. The department will act on each construction permit application in accordance with AS 46.14.160 and this section.After consulting with the applicant, the department will specify dates by which the applicant shall submit any additional information requested under AS 46.14.160(c).

(b) **Preliminary Permit Decision**. No later than 60 days after an application is determined or considered to be completed under AS 46.14.160

(1) the department will make a preliminary decision to approve or deny the application by preparing a . . .

(c) **Public Notice and Comment.** For each construction permit application that has been preliminarily approved, notice and opportunity for public comment and hearing will be provided as follows:. . .

(1)(F) the date on or before which the department must receive public comments on the proposed permit, to be no sooner than 30 days and no later than nine months after the first date the notice published;

AS 46.14.160 Completeness determination. (a) The department shall review every application submitted under this chapter for completeness. To be determined complete, an application must provide the information identified by the department in regulations adopted under AS 46.14.140(a)(1) and must be certified true and correct by the owner and operator.

(b) The department shall notify the applicant in writing whether the application is complete. Unless the department notifies the applicant within 60 days of receipt of an application that the application is incomplete, the application is considered to be complete. The problem is evident. The statute grants the ADEC 60 days to determine if an application for an Air Quality permit is complete. Following that, per 18 AAC 50.315(b)(2), the department has an additional 60 days to reach a preliminary decision. If the department makes a preliminary

decision to approve the construction permit application, then the 30-day public comment period begins (18 AAC 50.315(c)(1)(F)). Currently the beginning of the 30-day public comment period is the point at which the CZM review clock can begin. If the DGC regulations are amended to state that within 7 days a resource agency must notify the coordinating agency if an application is complete for purposes of determining consistency, then the clock could start.

Another way to explain this may be through the following example: A company files an air permit application for a project in month 1 and amends the application 1 month later. The amendment includes elimination of several emission sources, and provides additional technical detail. The remainder of needed application is filed early the following month, with the understanding that the draft air permit would likely be available for public notice in the same month. Instead, it takes an additional five weeks to resolve a series of very technical details before a draft air permit could be prepared and ready for public notice. Once the draft air permit was complete, the ACMP review initiated.

AOGA does not believe any of the permit/compliance/modeling issues being resolved during this five week period provided information needed for the review participants to better understand coastal zone effects - that information was provided in the original applications which specified probable emissions (worst case) and sources.

For permits, which under the ACMP standards are consistent when issued, there should be no requirement to wait for the permit to be issued to complete the consistency review.

AOGA proposes the following:

6 AAC 50.225. DETERMINATION OF COMPLETENESS AND NOTICE TO APPLICANT.

~~(a) As soon as practicable,~~ Within seven days of ~~upon~~ receipt of a consistency review packet, the coordinating agency shall determine whether the packet is complete.

(b) A consistency review packet is complete when

(1) the packet meets the submission requirements of 6 AAC 50.220; and

(2) an authorizing resource agency determines ~~an authorization application meets their statutory and regulatory requirements for completeness~~ that the application contains sufficient information to begin reviewing the project for consistency with the ACMP, notwithstanding that additional information may be required subsequently to meet statutory and regulatory requirements.

~~(3)~~ (c) The coordinating agency may determine~~s~~ the packet is sufficient for continued processing even though additional information may be required subsequently.

~~(c)~~ (d) If the coordinating agency determines the packet is incomplete, the coordinating agency shall notify the applicant within 7 days and identify the information necessary to make the consistency review packet complete. (Eff. _____/_____/200__, Register ____)

Authority: AS 44.19.145 AS 44.19.161 AS 46.40.096
AS 44.19.160 AS 46.40.040

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.230. DETERMINATION OF THE SCOPE OF THE PROJECT SUBJECT TO CONSISTENCY REVIEW.

AOGA Comment

These provisions are duplicative and should either be eliminated or track the language of .005 and .025 exactly. The only reason to keep it in is if you are going to have different scoping requirements for state permits and federal permits.

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.235. TIMING OF A CONSISTENCY REVIEW.

AOGA Comment

We recommend changing/adding the following provisions to this section:

- A 30-day review may not be changed to a 50-day review after the start of the review process; and
- A 30-day review may not be changed to a 50-day review without the concurrence of the applicant.
- With the concurrence of the applicant, a 30-day review may be extended from 1 to 20 days to accommodate agency public comment periods.

In Subsection (b) the term *more than minimal impacts* is too subjective and does not clearly separate a 30 day review from a 50 day review.

AOGA strongly recommends a list of projects suitable for 30 day review be included in these regulations. Projects that have known activities, are well understood, and have not been controversial in the past, can be listed by the resource agencies for a 30 day review schedule.

Subsection (c) doesn't allow the coordinating agency to covert a 30-day review into a time span other than a 50-day review period. The ability to extend, with the concurrence of the applicant, a 30 day review to less than 50 days is necessary for some DEC single agency reviews, where a 30-day public comment period is required for the permit. After the public comment period the agency needs the ability to immediately issue both consistency and the permit thereafter. Presently they are extending to 50 days, even though the permit could have been issued in day 34. This subsection could be reworded to: *The coordinating agency, with concurrence from the applicant, may extend a 30-day consistency review to a maximum of 50 days if additional information, including public comment is determined to be necessary.*

Extending a review from a 30 day to a 50 day review should be based on explicit factors rather than *minimal impact on coastal uses or resources*. And in fact, if the impacts are "minimal",

there should be no consistency review.

6 AAC 50 is amended by adding a new section to read:
6 AAC 50.240. INITIATION OF A CONSISTENCY REVIEW.

AOGA Comment

In a single agency review, the start of the permit review process and consistency should be the same. There would seem to be no purpose in starting the consistency review later, unless the agency had no intent to adhere to the timetable.

The proposed requirements for making the consistency review packet available are too uncertain, leaving the process open to legal attack. This section should be reviewed to be certain the "shall" language in (b)(1)(2)(3) can actually be accomplished. We recommend "will" furnish etc.

AOGA proposes the following:

6 AAC 50.240. INITIATION OF A CONSISTENCY REVIEW.

(a)…
(b) A single-agency consistency review ~~may~~ must start at the time the agency initiates its authorization review, provided the consistency review packet is complete.
(c)…
(d) By Day 3 of a consistency review, the coordinating agency ~~shall~~ will
(1)….
~~(2) furnish a copy of the consistency review packet to a person interested in the project~~ ;
~~(3)~~ (2) make a copy of the consistency review packet available for public inspection and copying in a public place.
~~(A)~~ ~~within a district that the coordinating agency considers is likely an affected coastal resource district; or~~
~~(B) in an area outside a coastal resource district that the project may affect.~~

6 AAC 50 is amended by adding a new section to read:
6 AAC 50.245 REQUEST FOR ADDITIONAL INFORMATION.

AOGA Comment

This section describing who may require additional information remains troublesome, both because of some history of abuse of this authority and the continuing potential for abuse. AOGA proposes language that continues to allow for additional information, but with some sideboards that attempt to ensure that the requests are relevant and necessary.

"Review participant" has been more precisely identified as "coastal district" and "resource agency". Requests must be tied to particular provisions and the coordinating agency must find they are necessary. The applicant has an obligation to "reasonably" respond, and can object. The coordinating agency, not the review participant, would have the responsibility to find that the response was inadequate or the objection invalid before it could be renewed.

We are proposing that the Request for Additional Information (RFAI) timeline be reduced so that additional information may be reviewed and the timeline aligned to the comment period milestones. Shortening the RFAI milestone to day 8 and day 23 allows 7 days prior to comment deadline. This 7 days can now accommodate the agency review time for the requested information without disrupting the review schedule.

AOGA proposes the following:

6 AAC 50.245 REQUEST FOR ADDITIONAL INFORMATION. (a) By Day ~~13~~ 8 in the 30-day consistency review or Day ~~25~~ 23 in a 50-day consistency review, a ~~review participant~~ coastal district and/or resource agency shall provide the coordinating agency and the applicant with any request and justification for additional information specifically necessary to determine the project's consistency. ~~A resource agency may request additional information necessary for a resource agency authorization review.~~ If the requestor is a coastal district, the request must be cited to a specific enforceable policy. If the requestor is a resource agency, the request must be cited to a specific provision of the state ACMP standards.

(b) The coordinating agency may request additional information at its own initiative or based on a request received under (a) of this section.

(c) The coordinating agency ~~shall~~ may request from the applicant such additional information ~~relevant to the proposed project~~ upon a finding that the information requested is necessary in order to determine compliance with a specific enforceable policy of a district program or the state wide ACMP.

(d) The applicant shall reasonably provide the requested information ~~to the requestor and a copy to the coordinating agency and other review participants~~ within its possession and control to the requestor. The applicant may timely object to provision of requested information on the grounds that the request is unduly broad or burdensome, or legally improper.

(e) Subsequent to such a response, the coordinating agency may require further information only upon a specific finding that the applicant's response is inadequate or its objections invalid.

(f) The requestor shall notify the coordinating agency and the applicant when the requested information is received. Within seven days of receiving the information, the requestor shall notify the coordinating agency and the applicant whether the information is adequate. If the requestor determines the information is not adequate, they shall do so in writing, outlining the precise reasons for the inadequacy.

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.250 COMMENT DEADLINES

AOGA Comment

The regulations should include a requirement for distribution. There have been review schedule delays because comments and responses to comments were not timely circulated.

AOGA recommends the following addition to this section:

The coordinating agency shall immediately distribute each public comment as it is received to the review participants; and, in turn, the review participants should submit to the coordinating agency, within five days, any analysis based on the public comment**.**

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.255. REVIEW PARTICIPANT COMMENT.

AOGA Comment

This section does not provide the opportunity for an applicant to be a review participant (see 6 AAC 50.990(39)). There is a great value associated with the applicant participating in the review process, especially regarding clarification of information, feasibility of alternatives, and mitigation planning.

Subsection (c) needs to reflect the coordinating agency's authority to determine to accept, not accept, or revise a stipulation (alternative measure) proposed for a consistency determination.

Finally, while there is benefit in requiring that a review participant comment on a project's consistency or inconsistency in terms of applicable enforceable policies within their "area of expertise," it is unclear what benefit is expected by inviting a review participant to comment "outside their area of expertise". Will the coordinating agency determine which comments are "within" or "outside" a commentor's area of expertise? That would seem a requirement under this proposed regulation. AOGA recommends this section be deleted and that a section be added requiring commentors to state their credentials in terms of "area of expertise."

AOGA proposes the following:

6 AAC 50.255 REVIEW PARTICIPANT COMMENT. (a) A comment submitted by a review participant shall

(1) be in writing;

(2) explain why the commentor believes the project is consistent or inconsistent with applicable ACMP standards or enforceable policies within the commentor's area of expertise;

(3) describe any ~~alternative measure~~ stipulation being recommended necessary to ensure the project is consistent with ~~the ACMP~~ either a specific

enforceable policy of an affected coastal district or a specific ACMP standard; and

(4) provide ~~a brief~~ justification, based on ~~ACMP enforceable policies,~~ such specific enforceable policy or standard, for any ~~alternative measure~~ stipulation the commentor considers necessary to ensure the project is consistent with the ACMP.

(b) When a resource agency is reviewing an authorization application for a project undergoing a consistency review, the agency shall identify in its consistency review comment any condition necessary to ensure compliance with the agency's statutory or regulatory authority that is also necessary to ensure the project is consistent with the ACMP.

(c) ~~In its consistency review comment, a review participant may address an enforceable policy outside their area of expertise.~~ While ~~T~~the coordinating agency shall give a resource agency or coastal resource district ~~with expertise due deference~~ recommendation for a stipulation due deference based on their level of expertise, the coordinating agency retains the authority to make the final determination as to whether or not the recommendation is necessary to achieve consistency under the ACMP and to accept, reject, or revise such recommendation..

(Eff. ___/___/200__, Register ___)

Authority: AS 44.19.160 AS 46.40.040 AS 46.40.096

6 AAC 50 is amended by adding a new section to read:

6 AAC 260. DEVELOPMENT OF A PROPOSED CONSISTENCY DETERMINATION.

AOGA proposes the following:

(a) By Day 24 in a 30-day review and Day 44 in a 50-day review, the coordinating agency shall distribute a proposed consistency determination to the review participants, the applicant, and any person who submitted timely ACMP comments under 6 AAC 50.500(a)-(c).

(b) In developing a proposed consistency determination, the coordinating agency shall give careful consideration to all comments, and shall give due deference, based on their level of expertise, to the comments and recommendations of affected resource agencies and affected coastal resource districts with approved programs.

(c) Based on the comments received, the coordinating agency shall determine whether there is consensus among the review participants regarding a project's consistency with the ACMP and any ~~alternative measures~~ stipulations recommended as necessary to ensure a project is consistent.

(d) When the comments indicate there is not consensus, the coordinating agency shall facilitate a discussion among the review participants to attempt to reach a consensus. When participants cannot reach consensus, the coordinating agency shall develop a proposed consistency determination that considers the comments and positions of the resource agencies, the applicant and affected coastal resource districts.

(e) The coordinating agency retains the authority to make the final determination as to whether to accept, reject or modify the stipulations proposed as necessary to achieve consistency under the ACMP;

(f) When the coordinating agency substantially modifies or rejects ~~an alternative measure~~ a stipulation requested by a commenting review participant within its respective area of expertise, the coordinating agency shall ~~consult with the commentator and~~ provide a brief written explanation stating the reasons for rejecting or modifying the alternative measure.

(g) ~~At a minimum a~~, A proposed consistency determination must contain

(1) a brief description of the proposed project;

(2) the scope of the project subject to review;

(3) a brief statement indicating whether the project is consistent or inconsistent with the ACMP; and

(4) the deadline for submitting a request for elevation and for filing a notice of petition under 6 AAC 50.610 and 6 AAC 50.620, respectively.

(h) In addition to the requirements in ~~(f)~~ (g) of this section, when the state determines a project is consistent with the ACMP, the proposed consistency determination must

(1) include an evaluation of the project against applicable enforceable policies;

(2) include any ~~alternative measure~~ stipulation determined to be necessary to ensure the project is consistent with ~~an~~ a specifically referenced enforceable policy;

(3) include a brief explanation for a required ~~alternative measure~~ stipulation;

(4) include any condition identified under 6 AAC 50.255(b); and

(5) identify the resource agency permit or authorization that will contain a~~n~~ ~~alternative measure~~ a stipulation that has been determined necessary to ensure consistency.

(i) In addition to the requirements in ~~(f)~~ (g) of this section, when the state determines a project is inconsistent with the ACMP, the proposed consistency determination must explain why the project is inconsistent.

(j) The coordinating agency may immediately issue a final consistency determination if the review participants and applicant concur with the proposed consistency determination and all ~~alternative measures~~ stipulations necessary to ensure consistency with enforceable policies , permits and authorizations, and no citizen eligible to petition under 6 AAC 50.620 submitted timely comments. (Eff. ___/___/200__, Register ___)

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.270. TIME FOR USSUANCE OF A FINAL CONSISTENCY DETERMINATION.

AOGA Comment

The time requirements in this section appear clear and certain.

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.275. RESOURCE AGENCY PROJECT AUTHORIZATION.

AOGA Comment

This section again raises the issue of "homeless" stipulations (alternative measures) that have no statutory or regulatory basis and hence no agency "home". As has been discussed previously, Alaska made the decision not to enforce its coastal program through a separate coastal zone permit so there is no authority to impose consistency stipulations that are outside the authority of agency statute and regulations nor is there authority to require an agency to implement consistency stipulations outside its statute and regulations. (See AOGA discussion under .055.)

AOGA has proposed language that consistency stipulations related either to ACMP standards or enforceable policies that are within agency authority are to be implemented by that agency. Consistency stipulations related to district enforceable policies that are authorized under the district's Title 29 authority should be implemented by the local government of the district.

We note that "disposals in state land" are exempted in (h). Are there other agency permits or authorizations that should be exempted here as well?

AOGA proposes the following:

6 AAC 50.275. RESOURCE AGENCY PROJECT AUTHORIZATION.

(a) A resource agency shall not issue an authorization for an activity that is part of a project that is subject to a consistency review unless the coordinating agency issues a final consistency determination that the project is consistent with applicable enforceable policies.

(b) A~~n alternative measure~~ consistency stipulation relating to ACMP standards developed during a consistency review that is authorized under a state statute or regulation ~~within a resource agency's area of expertise shall~~ will be implemented through the appropriate agency authorization for the project. ~~An alternative measure not clearly under any agency's expertise shall be implemented through all resource agency authorizations required for a project.~~

(c) ~~Any condition necessary to ensure compliance with an agency's statutory or regulatory authority that is also necessary to ensure the project is consistent with the ACMP shall be included on the agency's authorization for the project~~. A stipulation related to a district's enforceable policy and not within an agency's statutory or regulatory authority, but authorized under the districts Title 29 authority, will not be listed.

(d) Following issuance of a final consistency determination, a resource agency may not include an additional ~~alternative measure~~ consistency stipulation on its authorization.

~~(e) When an agency's authorization contains a condition more restrictive than a similar alternative measure required for consistency with the ACMP or an alternative measure~~ consistency stipulation ~~included on the authorization is more restrictive than an agency's similar condition, the more restrictive measure or condition shall be controlling.~~

~~(f)~~ (e) When there is an administrative appeal of an authorization for an activity that is part of a project, the deciding agency may not modify a~~n alternative measure~~ stipulation included on the resource agency authorization.

~~(g)~~ (f) When there is an administrative appeal or additional review under an agency's statutory or regulatory authority, a resource agency may modify a condition identified in the final consistency determination if the deciding agency finds the project will remain consistent with

the ACMP.

~~(h)~~ (g) Except for a disposal of interest in state land, when a project is found consistent with the ACMP, a resource agency shall issue an authorization necessary for a project within five days after the agency issues or receives the final consistency determination, unless the agency finds additional time is necessary to fulfill its statutory or regulatory requirements.

~~(i)~~ (h) Following receipt or issuance of a final consistency determination, DNR shall issue a disposal of interest in state land at the time and in the manner provided by applicable law, regulation, and agency procedure.

~~(j)~~ (i) Notwithstanding a consistent finding for a project, a resource agency may deny approval of an authorization application. (Eff. ___/___/200__, Register ___)

Authority: AS 44.19.160 AS 46.40.040 AS 46.40.100
AS 44.19.161 AS 46.40.096

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.280. CONSISTENCY REVIEW SCHEDULE MODIFICATION AND TERMINATION.

AOGA Comment

This section illustrates the difficulty of implementing a 30 or 50 day review process. This provision provides a series of opportunities for "timeouts" or delays in the process. While each may be necessary at one time or another, collectively they serve to defeat any certainty of timely review under the ACMP.

It might be useful to have (a) (5) (6) (7) and (8) run concurrently to prevent stacking of delays. We attempted to accomplish this by placing "or" after each of the subparts.

We also suggest that DGC, along with all of the parties, review the federal consistency process which has stricter timeframes. The state consistency process should consider adopting those timeframes.

The final responsibility for ensuring timetables are met is up to DGC. Under these proposed regulations DGC is the timekeeper for the process. We have suggested in .035 that DGC establish a protocol for timeliness of review. This will probably require reports to the Resource Cabinet and the Governor as to which agencies are not responding in a manner necessary and appropriate to a networked program.

We are still reviewing this section. If there are to be 30 and 50 days reviews, then the reasons to stop the clock must be exceptional circumstances.

AOGA proposes the following:

6 AAC 50.280. CONSISTENCY REVIEW SCHEDULE MODIFICATION AND TERMINATION. (a) The coordinating agency may modify the consistency review schedule

under the following circumstances and for the time specified; however, the coordinating agency will make every effort to reduce schedule modifications and extensions in order to provide 30 or 50 day reviews deadlines; and

(b) The coordinating agency will consult with the applicant to determine key project milestones and will take such milestones into consideration when granting schedule modifications. Such modification are allowed as follows:

(1) the coordinating agency and resource agency may agree to modify the review schedule as necessary to coordinate the consistency review with the agency's statutory or regulatory authorization review process, ~~including a DNR disposal of interest in state land,~~ provided the length of time for receipt of comments is at least as long as under 6 AAC 50.250;

(2) when the coordinating agency requests additional information from the applicant under 6 AAC 50.245, the coordinating agency may modify the review schedule as necessary until the requesting review participant receives the information and considers it adequate within the timeframe identified under 6 AAC 50.245(e);

(3) the coordinating agency may modify the review schedule as necessary for a public hearing or public meeting that is held as part of
   (A) a consistency review;
   (B) a resource agency's review of a necessary authorization application;
   (C) an affected coastal resource district's review of a municipal authorization required for a project undergoing a consistency review, including the administrative review or appeal process for a municipal authorization; or
   (D) preparation of an affected coastal resource district's comments for submission to the coordinating agency;

(4) the coordinating agency may extend the review schedule at the request of the applicant;

(5) the coordinating agency may modify the review schedule as necessary to address a complex issue raised during the course of the consistency review. The length of schedule modification will be determined jointly by the coordinating agency and the applicant; or

(6) the coordinating agency may modify the review schedule by up to 5 days for a review participant to consider timely submitted public comments; or

(7) the coordinating agency may extend the comment deadline by up to 10 days for a project within a coastal resource service area; or

(8) the coordinating agency may extend the review schedule by up to 10 days if a review participant requests time for a field review;

(9) the coordinating agency may modify the review schedule as necessary following distribution of the proposed consistency determination to assure the applicant receives the determination;

(10) when the coordinating agency receives a request for elevation under 6 AAC 50.610, the coordinating agency shall suspend the review schedule by up to 15 days for each elevation;

(11) when the coordinating agency receives a notice of petition under 6 AAC 50.620, the coordinating agency shall extend the review schedule by up to 50 days for the petitioner to file a petition on a proposed consistency determination and the council

to act on the petition under AS 46.40.096(e) and

(A) an additional five days if the council dismisses the petition; and

(B) an additional 15 days if the council remands the proposed consistency determination to the coordinating agency for the coordinating agency to render a revised proposed consistency determination, and an additional five days to provide an opportunity to request elevation of the revised proposed consistency determination under 6 AAC 50.610.

(b) The coordinating agency shall notify the applicant and each review participant of the terms of a schedule modification.

(c) When the coordinating agency restarts a review that was suspended under this section, the day that the review is restarted shall be assigned the day of the review schedule on which the review was suspended.

PROPOSAL FOR NEW SECTION ON NEGATIVE DETERMINATIONS.

AOGA proposes that there be provision for a negative determination for state projects, just as there is in the federal consistency process, and for the same reasons.

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.285. NEGATIVE DETERMINATIONS

(a) If an applicant determines that an activity will not have a direct and significant impact on any coastal use or resource, the applicant may provide DGC or the reviewing agency with a negative determination. The bases for a negative determination are:

(1) the activity is the same or similar to activities which have been reviewed and found to be consistent with the ACMP; or

(2) a thorough consistency assessment performed by the applicant and supported by materials submitted under (b)(3) of this section; or

(3) the activity is the preparation and implementation of oil spill contingency plan requiring separate review and approval by state and federal agencies; or

(4) the activity is categorically consistent (A-List); or

(5) the activity has a general concurrence determination (B-List); or

(6) the activity is an environmentally beneficial project that protects, preserves or restores the natural resources of the coastal zone or a mitigation plan.

(b) An applicant's negative determination shall include

(1) a brief description of the activity;

(2) a map showing the activity's location;

(3) the basis of the applicant's determination that the activity will not have a direct and significant impact on any coastal use or resource. The applicant's determination shall include an evaluation of the activity relevant to the enforceable policies of the ACMP or the affected coastal resource district's approved management program.

(c) Upon receipt of an applicant's negative determination, DGC or the reviewing agency shall solicit comments regarding concurrence or objection from each agency which may be required to issue a permit or authorization for the activity and potentially affected coastal resource district. DGC or the reviewing agency shall establish the deadline for the receipt of comments. A comment may be written, electronic or verbal.

(d) Within 30 days of the receipt of a complete negative determination, DGC or the reviewing agency will

(1) concur with the applicant's negative determination; or

(2) object to the applicant's negative determination.

(e) If DGC or a reviewing agency does not concur with or object to an applicant's negative determination within 30 days, concurrence is presumed.

(f) When an applicant does not concur with DGC's or a reviewing agency's objection to a negative determination, the applicant may request an elevation of the objection pursuant to 6 AAC 50.610.

(g) In instances where the negative determination has not received DGC or reviewing agency concurrence, the activity is subject to consistency.

ARTICLE 8. PROJECT MODIFICATIONS AND RENEWALS OF AUTHORIZATIONS

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.800. PROJECT MODIFICATIONS DURING A CONSISTENCY REVIEW

AOGA Comment

This section as proposed only addresses the extreme of terminating a consistency review. Minor modifications that would require adjustments like a revised review schedule or concurrence from review participants need detailing.

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.810. PROJECT MODIFICATIONS AFTER ISSUANCE OF A FINAL CONSISTENCY DETERMINATIONS.

AOGA Comment

AOGA's comments in this section are focused on distinguishing between project modifications that require additional consistency review and those that do not.

Minor, insignificant impacts or additional effects that don't change the scope of the previously reviewed project should not be subject to a consistency review even if new or modified permits are issued for this purpose. If the review participants agree that the scope and the effect are the same or inconsequential to the original review, then no review is needed even if permits are re-issued (new or modified).

Revise Subsection (a) to read**:** When a project has already received a final consistency determination and an applicant proposes a project activity modification or amendment that has an increased direct and significant impact on any coastal use or resource, a new CPQ shall be submitted. The new CPQ shall contain a detailed description of the proposed modification. The CPQ for the proposed modification must be submitted to the agency that coordinated the consistency review for the project.

Add a new (b) to read: When a project has already received a final consistency determination and an applicant proposes a project modification or amendment in which the impact on any

coastal use or resource remains the same or is decreased, then no CPQ is required.

Revise proposed (b)...which would now be (c) to read: A modification that is proposed to a project for which a final consistency determination or response has been issued ~~shall~~ must be subject to a consistency review when the proposed modification will likely ~~cause~~ have a direct or significant additional impact~~s~~ to coastal uses or resources and...

Subparts (e) (1-4) should be deleted. The deciding factor as to when a proposed modification requires a consistency review should not be whether or not the modification requires a new or changed permit or authorization, but rather the *impact or effect* of the proposed modification on coastal uses and resources. (See new (b).)

In subparts (e)(5) & (6) it would be clearer to use the term *revision* instead of *modification* to describe authorization**.**

In subsection (f) we suggest use of the term *will* rather than *shall* in order to allow the applicant or agencies to distribute the CPQ for the coordinating agency.

Subparts (f)(1) and (2) should be re-worded and re-ordered.

(f) When a CPQ is required, the coordinating agency shall distribute the CPQ for the proposed modification to the review participants. Each review participant shall respond to the coordinating agency within 5 days after the CPQ is distributed and identify whether

~~(1) a new authorization or change to an existing authorization is required; and~~

(~~2~~(1) the proposed modification ~~may~~ is likely to cause additional direct and significant impacts to coastal uses or resources ; and

(2) the proposed modification may increase the scope of the original consistency review.

Subsections (g), (h), & (i) should be revised to match to the comments provided above.

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.820 AUTHORIZATION RENEWALS.

AOGA Comment:

The proposed changes to this section are designed to clarify the intent.

AOGA proposes the following:

(a) When a~~n~~ permit or authorization for any existing project is subject to renewal and the project owner or operator does not propose a ~~no~~ modification to the project ~~is proposed~~ that would not be permitted or allowed under the existing authorization, no ~~further~~ action under

this chapter is necessary.

(b) When a permit or authorization for any existing project is subject to renewal and the project owner or operator proposes a modification to the existing project that would not be permitted or allowed under the existing authorization ~~is also proposed~~, the ~~renewal and~~ proposed modification shall be subject to the provisions of 6 AAC 50.810.

6 AAC 50 is amended by adding a new section to read:

6 AAC 50.830. AUTHORIZATION EXPIRATION.

This section should be deleted. Here again the proposed regulations automatically require a consistency review when an authorization expires just because it did expire and a new authorization is sought. Consistency reviews should only be required on existing projects because of the likelihood of new direct and significant impact on coastal uses and resources. This section should be added in a provision under 6 AAC 50.820 that allows a new authorization to be issued without a consistency review when a project has remained unchanged and the new authorization is sought within 18 months.

ARTICLE 9. GENERAL PROVISIONS

910. Optional Preliminary Consistency Determination.
920. Emergency Expedited Review and Waiver of Review.
950. Computation of Time
990. Definitions.

6 AAC 50 is amended by adding a new section to read:
6 AAC 50.910. OPTIONAL PRELIMINARY CONSISTENCY DETERMINATION.

AOGA Comment

We are still reviewing this section. It is an interesting concept, apparently based on the "best interest finding" process of oil and gas lease sales. Preliminary thinking is that (1) DGC needs to clearly identify what it hopes to accomplish so all parties are reviewing with the same "goal" in mind; (2) the standard (a)(2) "significant public interest in the project" means that the very use of this process will signal that DGC and the state agencies view the project as controversial. This "signal" will invite more controversy which is not productive; (3) under any circumstances or standard, the applicant should be the *only* party who can request this "optional" determination. If other parties can request that the process be used and that request is denied, the denial opens the door to further legal action. If an "optional concept" is to be pursued then the goal must be so clear and the process so attractive that it becomes the option of choice for projects large and small.

6 AAC 50 is amended by adding a new section to read:
6 AAC 50.920. EMERGENCY EXPEDITED REVIEW AND WAIVER OF REVIEW.

AOGA Comment

While we are still reviewing this section, it appears helpful and necessary.

6 AAC 50 is amended to read:
6 AAC 50.990. DEFINITIONS.

AOGA Comments

We are still reviewing this section. We have considerable disagreement with many of the definitions, primarily because they are so encompassing that they are of no value as a statement of what a thing is or is not. Several of the definitions are simply conclusions or begin with a standard and end with a conclusion. The main difficulty in evaluating these

definitions is simply not knowing what DGC is trying to accomplish. New definitions are usually proposed in order to resolve uncertainty or disputes or sometimes to ensure authority for a current practice that may be in dispute. The "intent" of each of the new definitions or changed definitions should be provided so that the public understands the goal. Preliminary responses to this section include:

(2) "**activity**" means a land or water use that may affect any coastal use or resource, including construction, reconstruction, or demolition of any structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; discharge of air pollutants; aquatic farming; timber harvest operations; log transfer facilities; oil and gas exploration and development; and oil spill contingency planning;

Comment: This is not a definition. It is a conclusion or a finding. It concludes that the listed activities have "a direct and significant impact on coastal use and resource." It is the responsibility of the consistency review process to make such determinations. The same activity may have a "direct and significant impact" in one situation and not have that impact in another situation. Rather than examples, "activity" should be defined a "a land or water use or action that has a direct and significant impact on coastal use or resource." We continue to object to the inclusion of oil spill contingency planning as an "activity" and ask for further discussion on this issue.

(3) "**affected coastal resource district**" has the meaning given in AS 46.40.096(g)(1);

Comment: "Affected coastal resource districts" should not be given the broad definition is AS 46.40.096 (g)(1), which was intended only to address standing to bring a petition. Districts should be defined in terms of their boundaries as required under the program.

(4) "alternative measure" means a requirement necessary to ensure the activity is consistent with the ACMP;

Comment: AOGA is recommending that "consistency stipulation" be used for "alternative measure". Stipulation is a term of art that implies legal authority and standards. "Alternative measure" implies a practice "other than" or "outside" legal authority and standards in the context it is used in these regulations. The term raises the question, "alternative to what"? Stipulation is widely used in regulatory language and well understood. This definition and its application require serious legal review. The use of "homeless stipulations" is one of the most troublesome practices in the coastal management program.

(7) "associated facility" means any development

(A) that is specifically designed, located, constructed, operated, adapted or otherwise used, in full or major part, to meet the needs of a federal activity or a federal or resource

agency regulatory action; and
(B) without which, the federal activity or a regulated activity, as proposed, could not be conducted;

Comment: We are not clear on the purpose of this definition. "Associated facility" is better defined at a "proposed structure". Remove "development".

(8) "authorization" means any permit, license, authorization, certification, approval or other form of permission that a resource agency is empowered to issue to an applicant; an authorization is a federal permit or license and has the meaning given in 15 C.F.R. 930, as amended;

Comment: "Authorization" is extraordinarily broad and should be "defined" in this definition. An assortment of terms related to agency actions are used throughout the statutes and current regulations. At the same time the statute and regulations make it clear that not every agency action is intended to be part of the consistency review process. This is an important definition if there is to be clarity in the process. This proposed definition creates a situation where certain agency actions, which never have been subject to review in the past, may now be subject to review. Thee is no language to give an agency the discretion to discriminate between activities that must be reviewed and those that would not require review. The challenge again is to distinguish between the routine and the significant.

(12) "condition" means a requirement necessary to ensure that an activity meets a resource agency's statutory or regulatory requirements and which may also ensure consistency with the ACMP.

Comment: We are not clear on the intent of this definition. What is the effect of "…and which may also ensure consistency with the ACMP"?

(19) "cumulative impacts" means, for the purposes of 6 AAC 50.710 and 6 AAC 50.730, that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects and the effects of currently permitted projects;

Comment: This is a conclusion, rather than a definition.

(25) "due deference" means that deference that is appropriate in the context of the commentor's expertise and area of responsibility, and all the evidence available to support any factual assertions; a coastal resource district whose district program has been incorporated into the ACMP is considered to have expertise in the interpretation and application of its program;

Comment:

The standard for "due deference" in this definition is appropriate. However, the "finding" that a coastal district will be accorded due deference is not appropriate in the definition section. Does

this mean that only coastal districts are to be given due deference in a consistency review? What about resource agencies, etc? The language "expertise in the interpretation and application of its program" affords close to unreviewable and un-challengeable deference to local districts as to the *legal* meaning and application of enforceable policies. As has been widely acknowledged, there is an existing problem with the broadness and vagueness of many such policies as currently drafted. This definition predetermines a district as an "expert" in the legal meaning of a broad and vague enforceable policy. This exacerbates the problem of badly drafted enforceable policies by establishing that such a policy means what the district says it means.

(33) "minimal impact" means a negligible disturbance to coastal uses or resources;

Comment: "Minimal impact" should more appropriately reflect a non-substantial impact rather than a "negligible" impact, which can be interpreted to be "almost none at all". This definition is also about setting standards and determining limits.

(36) [(22)] "project " means all activities that will be part of a proposed coastal development, including associated facilities, that are subject to the consistency review requirements under this chapter.

Comment: We are not clear on the intent. Language from the present definition is clearer: "An activity or use that will be located in ~~or may affect~~ or will have a direct and significant affect on the coastal zone and that requires the issuance of at least one state permit"

(39) [(25)] "review participant" means

(A) a resource agency, a state agency that has requested participation, and an affected coastal resource district; and

(B) if a project includes an oil discharge prevention and contingency plan, "review participant" includes an affected regional citizens advisory council as defined in 33 U.S.C. 2732(d);

Comment: An RCAC should not be a "review participant" in the sense the term is used in these proposed regulations, nor should any other NGO (non government organization). RCAC's have been described as "review participants" in the past, but with the expectation of much different roles and authorities than prescribed in these regulations. As proposed, the role of review participants is greatly expanded. Without statutory authority in AS 44 or 46 it is questionable that any NGO can or should be given the authority, by regulation, to sit as an equal decision-maker with the resource agencies.